No. 91-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The issue in this case is whether the total ban on write-in voting enforced by Hawaii -- an absolute prohibition that only three other states impose[1] -- can survive constitutional scrutiny under the First and Fourteenth Amendments. Respondents characterize this as a dispute about "ballot access." Petitioner believes that this characterization is unduly narrow and, as explained more fully in our opening brief, implausibly ignores the independent right of voters to express their true political preferences through the exercise of a meaningful franchise. While disagreeing with its result, petitioner agrees with the Ninth Circuit that this case is governed by the analytic framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Properly applied, however, that analysis compels reversal of the decision below.

Under *Anderson*, a court that is called upon to review a statute or policy restricting electoral participation must engage in a three-step inquiry. First, it must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Id.* at 789. Second, it must "evaluate the precise interests put forward by the State as justifications for the burdens" imposed. *Id.* Third, it must consider the "legitimacy" and "strength" of those interests as well as the "extent to which those interests make it necessary to burden plaintiff's rights." *Id.* Moreover, the cases following *Anderson* make clear that once a reviewing court finds that a statute or policy substantially burdens rights of electoral participation, it must inquire whether the restrictions imposed are "narrowly tailored" in the pursuit of "compelling governmental interests." *Norman v. Reed*, __ U.S. __, 112 S.Ct. 698, 705 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989); and *Tashjian v. Republican*

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[1] Pet.Br. at 8, n.5.

Party of Connecticut, 479 U.S. 208, 222 (1986).

Petitioner's opening brief demonstrated how and why Hawaii's policy seriously burdens the ability of voters to express in a formal way their dissatisfaction with the officially designated candidates for a particular office. By banning all write-in votes, Hawaii has effectively told those voters to stay home. The burden that this policy imposes on the right to vote is absolute. And it is obviously more severe than in states where write-in voting is circumscribed by more specific and narrowly confined regulatory measures. Those other measures are not at issue in this case. Hawaii's total ban is.

Given the "character and magnitude" of the burdens created by Hawaii's total ban, the state must demonstrate that its policy is "narrowly" drawn to advance interests of compelling importance. This showing has not been made and cannot be made. Hawaii's total prohibition of all write-in voting in all elections and in all circumstances reaches far more broadly than "necessary" to advance any of the state's proffered justifications.

In an effort to minimize the nature of petitioner's injury, respondents argue that the act of voting in a democratic society serves only as a means of choosing a potential officeholder among candidates listed on the ballot where the choice can "effect a legal transfer of power" in the immediate election. (Resp.Br. at 27). Accordingly, respondents insist that no serious constitutional concern arose when, in the 1986 election for the State House of Representative seat in his district, Burdick was given a ballot with only one candidate and when he was told that he could vote only for that candidate -- whose views he found unacceptable -- or not vote at all.[2]

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[2] The ballot offered petitioner in 1986 containing the names of a single candidate for petitioner's legislative district was not unusual. In the 1986 general election in Hawaii, 33% of the elections for state leg- (continued...)

Respondents' narrow conception of the franchise is critical to their argument.[3] But, it is a conception that ultimately reduces the complex act of voting to its most narrow instrumental function. It simply defies reality to argue, as respondents do, that voting involves no expressive activity worthy of any constitutional attention whatever unless such expression is directed in support of one of the candidates listed on the ballot. These matters are amplified in Point I below.

In further defense of Hawaii's policy, respondents suggest a series of interests that are advanced by the policy at issue here. In so doing, respondents never really ask whether the total prohibition against all write-in voting is "necessary" or "narrowly tailored" to the pursuit of these interests. Such an inquiry would be fatal to respondents' position. This argument is addressed in Point II.

Finally, respondents suggest erroneously that the instant case involves only a facial challenge to Hawaii's

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[2] (...continued)
islative offices involved contests where a single candidate ran unopposed. (J.A.272-80). In the 1984 general election 39% of all state legislative races involved candidates running unopposed. (J.A.258-66). And in the 1982 general election 37.5% of the state legislative races were uncontested. (J.A.244-52).

[3] Respondents' view that voting is limited to the act of choosing a potential officeholder from among those candidates listed on the ballot leads them to conclude that the rights of voters are inseparable and indistinguishable from the rights of candidates. This, in turn, leads respondents to characterize this case as little more than a candidate's ballot access controversy where broad deference to the state's regulation should be conferred unless it can be shown that the state's laws "'freeze the political status quo,' *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), such that it is 'virtually impossible,' *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), for dissidents to be counted." (Resp.Br. at 26). Because this contention largely misses the point of petitioner's claim, this Court need not resolve whether Hawaii's ballot access laws are, in fact, as liberal as respondents assert. (Resp.Br. at 20-21).

policy; that petitioner can, therefore, only prevail upon a showing that the policy is unconstitutional in all its potential applications; and that petitioner can make no such showing here. Respondents further suggest that a reversal of the decision below would upset the election laws in some thirty states. These arguments by the state are wrong at every turn, as will be explained in Point III below.

ARGUMENT

I. RESPONDENTS' CONCEPTION OF VOTING ERRONEOUSLY DISCOUNTS THE EXPRESSIVE ASPECTS OF ELECTORAL PARTICIPATION

In an effort to diminish or avoid the "character and magnitude" of the burdens posed by Hawaii's total prohibition of write-in ballots, respondents adopt a narrow conception of the act of voting. According to respondents, the only important value of the right to vote is the capacity of the voter, if he or she is lucky enough to be joined by a sufficient number of like-minded voters, "to effect a legal transfer of power" to the candidate of their choice. (Resp.Br. at 27). The idea that the only reason for a citizen to cast a vote, and that the only reason for a democracy to value elections, lies in the choice of the next officeholder is indefensibly narrow. Never an accurate characterization of what actually goes on in a democracy, its flaws are especially apparent in this electoral season.

Consider the 37% of Republican voters who, in the New Hampshire primary election, cast ballots for Patrick Buchanan, or the 4% of the Democratic voters who wrote in the name of Mario Cuomo in that election. *See* N.Y. Times, Feb. 20, 1992, at A21. When these citizens voted the way they did, it is reasonable to assume that many did not expect their candidate to prevail. Yet,

in the American political experience, such protest votes indicate in the unmistakable, durable and irreplaceable manner afforded by voting, various values, commitments and political judgments the voters hold dear; they affect future decisions by candidates and potential candidates; they shape party platforms; they inspire voters in other states and other elections. They are meant, to the extent possible, both to communicate the voters' feelings and to influence the future course of political events in a myriad of ways besides and beyond the direct choice of a winning candidate in the election before them. *See* N.Y. Times, Feb. 19, 1992, at A1 ("Mr. Buchanan's support . . . amounted to a roar of anger from those who voted in the Republican primary, and it showed the power of a 'send a message' campaign . . . .").

No interviews on television, or letters to the editor, or public opinion polls could take the place of what these voters actually did in the privacy of the voting booth, with the solemnity and sacrifice of their "portion of . . . sovereign power." *Luther v. Borden*, 48 U.S. (7 How.) 1, 30 (1849)(statement of counsel, Daniel Webster). This is what makes voting a complex and immensely valuable act of "expression, commitment and choice." (Pet. Br. at 11). Respondents ignore the rich complexity of the franchise by reducing it to its most narrow instrumental function.[4]

The observations of the Fourth Circuit in *Dixon v. Maryland State Board*, 878 F.2d 776, 782 (4th Cir. 1989), aptly describe the voting interests of citizens -- like those

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[4] Even under respondents' narrow conception of voting -- a conception that looks to whether the vote can "effect a legal transfer of power" in the immediate election -- Hawaii's total ban on write-in voting raises serious constitutional concerns. There are examples where write-in voters have caused the "legal transfer of power" by electing an individual not listed on the ballot. *See Amicus Curiae* Brief of the Socialist Workers Party at 8. In such circumstances, a total prohibition against write-in voting would have defeated the will of the majority.

who voted for Buchanan or Cuomo in New Hampshire -- who use the vote to convey powerful political messages:

> Such dissident voters are no doubt aware that, as efforts to achieve the actual election of their favorites, their votes probably will be without effect. Nonetheless, these voters cast their ballots as they do, in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence. Our system of government accords the expression of this hope the status of a protected right.

The State of Hawaii not only refuses to accord such expression "the status of a protected right," it refuses even to acknowledge that the expressive aspect of voting in this fashion is a sufficiently weighty constitutional interest to require that Hawaii demonstrate that its absolute prohibition against write-in voting is "necessary" to the advancement of any substantial state interests.

In advancing this position, respondents further ignore the language and logic of this Court's opinions recognizing the important expressive component to electoral participation. In *Illinois Election Board v. Socialist Workers Party*, 440 U.S. 173, 186 (1979), this Court observed that, "an election campaign is a means of disseminating ideas as well as attaining political office." And in *Eu*, 489 U.S. at 223, the Court further announced that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *See also Anderson*, 460 U.S. at 788.

If political speech during the campaign -- even on behalf of a candidate that is not likely to prevail -- receives the highest constitutional protection, it cannot follow that such expression is completely undeserving of any constitutional recognition when it takes place in the voting booth. Political expression and ideological debate

do not end with the campaign. The expressive aspects of the electoral process surely extend into the voting booth when the citizen expresses what he or she has come to believe in the course of the campaign. That expression may take the form of support for one of the candidates listed on the ballot or it make take the form of a protest or dissent from all of the listed candidates. In either event, voting must surely involve an expressive act that enjoys sufficient constitutional recognition to require that Hawaii explain why it is "necessary" to curtail this expressive aspect of electoral participation in the way that it does.

Although respondents fashion a definition of voting that largely ignores the expressive nature of the franchise, the state does address petitioner's First Amendment arguments, in passing. Regarding the claim that Hawaii's policy conditions electoral participation upon the waiver of a citizen's right to be free from being compelled to support candidates or ideologies with which one disagrees, respondents insist that no coercive conditions are imposed here. (Resp.Br. at 40). Respondents assert that if petitioner chooses to abstain from voting for a particular candidate his vote will be recorded as a "blank vote" which will "send[] a message about the strength of a winning candidate's mandate." This message, respondents imply, will satisfy the voter's participatory and expressive interests. (Resp.Br. at 40).

Respondents make no claim, however, that a "blank vote" is the equivalent of a dissenting vote. Nor could they. For there is no reason to believe that the "blank vote" represents a conscious act of protest any more than it might signify an inadvertent error of omission; or a manifestation of voter indecisiveness; or a lack of familiarity by the voter with the candidate or candidates running for office. In short, the "blank vote" conveys no real message of dissent at all. It provides no adequate answer to the claim that Hawaii's policy requires that, in

some number of circumstances, petitioner must express support for a candidate whose views he finds distasteful or suffer the penalty of not participating in the election at all.[5]

Respondents similarly provide no adequate answer to petitioner's claim that Hawaii's policy restricts the medium of the ballot on the basis of the content of the message conveyed by the voter. In this regard, the state insists that, under *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), it can set the "agenda" for whatever speech takes place in the voting booth and that the State of Hawaii chooses to limit the "agenda" to the candidates listed on the ballot. (Resp. Br. at 49). Respondents' reliance on *Cornelius* is misplaced for the simple reason that petitioner is prepared to respect the electoral "agenda" set by the state. Specifically, he is prepared to speak about the candidates listed on the ballot. However, instead of expressing support for at least one of the candidates on the ballot, Burdick seeks to criticize them all.

Finally, respondents' reliance upon *Rust v. Sullivan*, __ U.S. __, 111 S.Ct. 1759 (1991), is equally unpersuasive. By invoking *Rust*, respondents suggest that petitioner seeks to compel the government not merely to tolerate his protest vote but to subsidize it. (Resp.Br. at 48). Once again, however, respondents misconceive the nature of petitioner's claim. Petitioner seeks no special subsidy for his message. He asks only that his rights of

[5] Respondents' suggestion that petitioner has a third option is unrealistic and unpersuasive. Respondents assert that petitioner could always spend a "Saturday afternoon" gathering "petition signatures" in support of his preferred candidate. (Resp.Br. at 40). But this suggestion conditions the right to vote on one's ability and capacity to become a political organizer sufficiently knowledgeable in the state's election law to satisfy all of the state's requirements regarding the filing of nominating petitions. This cannot be the price one must pay in order to express a protest vote.

electoral expression be treated equally with the electoral expression of all other voters. To the degree that the state counts and publicizes all votes expressing support for one of the candidates listed on the ballot, petitioner asks only that his vote -- expressing dissatisfaction with all the listed candidates and proposing an alternative choice -- be treated no differently. Petitioner seeks merely the equal right "to express his own individual will in his own way." *Oughton v. Black*, 61 A. 346, 348 (Pa. 1905).

II. HAWAII'S TOTAL BAN AGAINST WRITE-IN VOTING IS NOT "NECESSARY" TO THE ADVANCEMENT OF ANY INTERESTS PROFFERED BY THE STATE IN SUPPORT OF ITS POLICY

In defense of its policy Hawaii identifies five interests that are served by its total prohibition against write-in voting. Hawaii's policy is neither "necessary" nor "narrowly tailored" in the pursuit of any of these interests.

A. The Interest In Protecting Against Unrestrained Factionalism

Hawaii's interest in preventing "unrestrained factionalism" involves, in the first instance, a desire to prevent candidates who lose primary elections from subsequently running in the general election. (Resp.Br. at 41). In response, petitioner previously suggested that this interest could be "achieved with more 'narrowly tailored' legislation"[6] and that "Hawaii's attempt to reach 'sore losers'

[6] For example, Hawaii might enact an officeholder disqualification statute that would bar an individual from holding office if he or she ran unsuccessfully for that office in a primary election. Hawaii has not chosen to enact such a statute, and no such statue is now before the Court. *Compare Storer v. Brown*, 415 U.S. 724 (1974)(commenting (continued...)

by barring all write-in voting even in elections that do not involve 'sore losers' is simply too unfocused." (Pet. Br. at 38).[7]

The state responds by arguing that it is not simply concerned about candidates who lose in the primary election running a write-in campaign in the general election. Hawaii now professes to be concerned also about "[d]isappointed staff, friends, supporters and others" mounting a general election write-in campaign. (Resp.Br. at 42).

In this respect, however, the state carries its interest in avoiding factionalism to an absurd degree. The desire to promote consensus within the political system and, therefore, to avoid factionalism may well be a worthwhile goal. But consensus depends upon consent. And Hawaii carries its interest in avoiding factionalism too far when it seeks to coerce consent by barring all write-in voting. The desire to prevent factionalism can no longer be viewed even as a legitimate state interest when it is extended, as respondents seek to do here, to every voter that might be disappointed by the outcome of a

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[6] (...continued)
with approval on a California law that barred losing primary candidates from running as independents in the general election). We would only note that "sore loser" statutes focus on the candidate rather than the voter and thus raise different analytic issues than the ban on write-in voting that Hawaii has imposed here. *See* n.9, *infra*.

[7] Respondents suggest that petitioner has mooted this controversy by conceding that this suit does not call into question narrowly drawn officeholder qualification statutes. (Resp.Br. at 28, n.23). Respondents base this claim upon the assertion that the policy at issue here is an officeholder qualification requirement because Hawaii refuses to permit anyone to hold office who is elected by a write-in vote. If Hawaii wants to call its broad policy prohibiting all write-in voting an "officeholder qualification requirement," it is free to do so. But, then petitioner would obviously take the position that this broad officeholder qualification requirement is unconstitutional for precisely the reasons advanced here and in Petitioner's Brief.

primary election.

B. The Interest In Protecting The Integrity Of The Party's Primary Elections

In response to Hawaii's expressed concern about "inter-party raiding," petitioner noted in his opening brief that this concern pertains only to primary elections and cannot justify a ban against write-in ballots in general elections. (Pet.Br. at 37). In addition, petitioner noted that Hawaii's alleged concern with "raiding" is undermined by its decision to permit "open" primaries. *Id.*

Hawaii now suggests that write-in voting is also necessary to prevent a person who is not a member of the party from emerging as a victor in that party's primary. (Resp.Br. at 43). However, this concern can be addressed with narrowly focused legislation imposing an affiliation requirement upon all those who would carry a party's standard into the general election. Again, the constitutionality of any such affiliation requirement is not before this Court in this case. What is before this Court is a total ban against all write-in voting, in general as well as primary elections, without any evidence that the state has attempted to pursue its legitimate interests in protecting the integrity of its political parties through narrowly tailored measures.[8]

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[8] It is petitioner's position in this case that Hawaii must permit write-in voting in primary as well as general elections. First, no political party has asserted a contrary associational claim and the Libertarian Party has expressed a clear interest in allowing write-in votes in its primary elections. *See Amicus Curiae* Brief of the Hawaii Libertarian Party at 2-3. Second, Hawaii is an overwhelmingly Democratic state and thus, as a practical matter, the results of the primary election are often dispositive. (J.A.215-84)(results of votes cast in the biennial general elections, 1976-1986). *See also Amicus Curiae* Brief of Common Cause/Hawaii at 11. Third, Hawaii law provides that the results of the primary are legally binding for all county and state legislative offices if a party's primary victor is unopposed in the general election.
(continued...)

C. The Interest In Protecting The Political Party Mandate And In Eliminating Uncontested Elections

Hawaii argues that a total prohibition against all write-in voting is necessary to protect its practice of permitting "runaway," (Resp.Br. at 12), primary winners from succeeding to office without the competition of write-in candidacies. But, in those situations where Hawaii has now eliminated the general election there is no occasion to cast a write-in ballot. Thus, the total prohibition against write-in voting does not serve that interest at all. Moreover, Hawaii's statutory and constitutional provisions protecting "runaway" candidacies render it all the more important to permit citizens to cast write-in votes in these dispositive primary elections. *See* n.8, *supra*.

D. The Interest In Voter Education And In Protecting Against Vacancies

The state's interest in voter education was fully addressed in petitioner's opening brief (Pet.Br. at 38). No rehearsal of that argument is necessary here. The state, however, also asserts that it has an administrative interest in preventing "the occurrence of a situation where, after a candidate is elected, he [or she] is found not to possess the qualifications [for office]." (Resp.Br. at 14) (citation omitted). This concern, if legitimate, can be addressed by reasonable registration requirements for

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[8] (...continued)
See Haw. Rev. Stat. §12-41(a); Haw. Const. art. III, §4 (1991 Supp.) This confluence of factors is critical to the constitutional analysis and may not exist in many other states. As this Court observed in *Tashjian*: "The analysis of these situations derives much from the particular facts involved." 479 U.S. at 224, n.13.

write-in candidates.[9] Such requirements permit election administrators to verify the qualifications of potential officeholders and, as petitioner has already acknowledged, present very different constitutional questions. (Pet.Br. at 31 n.22). For present purposes, however, the existence of these alternatives only underscores the unconstitutionality of the blunderbuss approach adopted by Hawaii, instead.

E. The Interest In Preventing Corruption

As a fifth interest, not relied upon by the court below, (*see* Cert.Pet. at 13a), the state insists that it seeks to reduce electoral corruption. It is true that in the late nineteenth century the state-prepared ballot (the Australian Ballot) was widely introduced in partial response to concerns about election fraud. But, as previously noted, most states permit some sort of write-in voting. Respondents have cited no evidence in this record that write-in voting has served as a vehicle for election fraud in the vast majority of states in which it is permitted. In the absence of any such evidence the court below -- even as it upheld Hawaii's policy -- did not even address this issue. There is no reason for this Court to give this claim any greater credence. Hawaii is free to enact if it does not already have "at its disposal a variety of criminal laws that are more than adequate to detect and de-

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[9] Petitioner does not believe that a voter should be disabled from writing in the name of an individual who has not registered as required by a candidate registration statute; nor does petitioner suggest that the write-in vote on behalf of one who has not registered should not be counted. In petitioner's view, the state's interests can be sufficiently satisfied by barring the candidate who has failed to register from holding office. The state has no real interest in also penalizing the expressive interests of the voter by refusing to permit or count a write-in vote on behalf of a candidate that failed to abide by a reasonable registration requirement. But, again this Court need not nor cannot resolve that issue in this case because Hawaii has not enacted any registration requirement, at all.

ter whatever fraud may be feared." *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972).

III. THIS CASE PRESENTS AN APPROPRIATE CHALLENGE TO HAWAII'S TOTAL PROHIBITION OF WRITE-IN VOTING

Respondents assert that this suit involves a purely facial challenge where invalidation of the entire policy would be inappropriate unless there are "no set of circumstances . . . under which the [policy] would be valid." (Resp.Br. at 47)(citations omitted). Respondents further suggest that the regulation of write-in voting would be appropriate in at least some circumstances and, thus, the facial invalidation of Hawaii's policy is inappropriate here. Respondents' argument is without merit.

This case began in 1986 when petitioner was told by Hawaii election officials that the state's policy against write-in voting meant that he either had to vote for the only candidate listed on the ballot in petitioner's state legislative district or not vote at all. From the very outset, therefore, petitioner was challenging Hawaii's ban on write-in voting as applied to him in a specific election.[10] At the same time, a ruling that petitioner's constitutional rights were violated in 1986 would necessarily doom Hawaii's general policy against write-in voting since the state has never pointed to any particular facts that distinguish petitioner's situation from any other. Under these circumstances, it is not at all clear that the line between "facial" and "as applied" challenges has any meaning.

[10] In this respect, petitioner's "as applied" challenge is no less cognizable because he "did not identify any particular candidate for whom he wished to cast a write-in vote." (Resp.Br. at 46 n.36). It is sufficient, for Article III as well as prudential standing purposes, that petitioner sought to express his opposition to the only candidate appearing on the ballot in Burdick's state legislative district. (*See* Pet. Reply to Br. in Opp. at 5-7).

Even if viewed as a facial challenge, however, this case closely resembles *Board of Airport Comm. of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), where, the Court struck down a resolution that imposed a total prohibition against all "First Amendment activities" within an airport terminal.[11] The Los Angeles Commissioners could have promulgated more narrowly tailored regulatory measures to address the municipality's genuine concerns but opted, instead, for a total prohibition. Similarly, Hawaii could have adopted a series of narrowly drawn regulations to address its specific concerns. Having failed to do so, the state cannot ask this Court to step into the breach and perform this essentially legislative task.

As previously noted, there are a number of legislative alternatives that may be available to Hawaii in furtherance of its legitimate interests. The choices among those alternatives can and should be made in the first instance by the state's political branches. The constitutionality of such regulatory measures will have to be determined if and when they are enacted.

For similar reasons, there is no basis to respondents' claim that, "[a]pplied generally, the [judgment below] would have nullified the laws [in] more than thirty States . . . ." (Resp.Br. at 1). The decision of the district court, if upheld, would speak only to the law in Hawaii and, perhaps, to the law in those handful of states that choose to prohibit all write-in voting in all elections and under

[11] *Jews for Jesus* was decided on overbreadth grounds, although the plaintiffs in that case were asserting their own constitutional rights and not, in the traditional overbreadth sense, the constitutional rights of third parties. Here too petitioner asserts his own constitutional rights.

all circumstances.[12]

In sum, the 1986 state legislative election left Burdick with two unpalatable choices: he could either vote for the sole candidate appearing on the ballot or he could choose not to vote at all. Petitioner asserts that the First and Fourteenth Amendments to the federal Constitution guarantee him another choice: the right to vote against the only candidate appearing on the ballot in Burdick's state legislative district and to vote, instead, for his preferred candidate. Hawaii's total prohibition against all write-in voting cannot constitutionally deny him that right.

[12] Even those states might be able to demonstrate a more compelling need for such a prohibition than Hawaii has demonstrated.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

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